



File Code: 1570-1/2200

Date: December 15, 2004

Erik Ryberg
Center for Biological Diversity
P.O. Box 710
Tucson, AZ 85702-0710

**CERTIFIED LETTER,
RETURN RECEIPT REQUESTED**

RE: Appeal #05-03-10-0004-A215, Bull Cr., Cow Cr., Macho, Soldier Cr., and Valle Osha Cattle Allotments, Pecos/Las Vegas Ranger Districts.

Dear Mr. Ryberg:

This is my review decision on the appeal filed regarding the five Decision Notices (DN) and Findings of No Significant Impact (FONSI), one Environmental Analysis (EA), which provides for the following:

- Bull Creek Allotment 48 cattle for up to 5 months
- Cow Creek Allotment 11 cattle for up to 5 months
- Macho Allotment 16 cattle for up to 5 months
- Soldier Creek Allotment 50 cattle for up to 5 months
- Valle Osha Allotment 77 cattle for up to 4 months

BACKGROUND

District Ranger Joseph Reddan published his decisions on September 28, 2004, for the Pecos/Las Vegas Ranger Districts on the Santa Fe National Forest on the allotments. The District Ranger is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR § 215 appeal regulations.

Pursuant to 36 CFR § 215.17, an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached.

My review of this appeal has been conducted in accordance with 36 CFR § 215.18. I have reviewed the appeal record, including the recommendations of the Appeal Reviewing Officer. My review decision incorporates the appeal record.

APPEAL REVIEWING OFFICER'S RECOMMENDATION

The Appeal Reviewing Officer found that: a) the decision logic and rationale were generally clearly disclosed; b) the benefits of the proposal were identified; c) the proposal and decision are



consistent with agency policy, direction and supporting information; and d) public participation and response to comments were adequate.

APPEAL DECISION

After a detailed review of the record and the Appeal Reviewing Officer's recommendation, I affirm the Responsible Official's decisions on the Bull Creek, Cow Creek, Macho, Soldier Creek and Valle Osha Allotments.

This decision constitutes the final administrative determination of the Department of Agriculture [36 CFR § 215.18(c)].

Sincerely,

*/s/ Gilbert Zepeda/s/ Gilbert
Zepeda
GILBERT ZEPEDA
Forest Supervisor*

cc: Constance J Smith, David M Stewart, Berwyn Brown, Joe Reddan, Allen Fowler, Mailroom R3 Santa Fe, Cecilia R Seesholtz, Julie A True

Enclosures (2)

REVIEW AND FINDINGS

of

Center for Biological Diversity's Erik Ryberg**Appeal #05-03-10-0004-A215****Bull Creek, Cow Creek, Macho, Soldier Creek, and Valle Osha Allotments****ISSUE 1: The Decision violates the NFMA and Santa Fe National Forest Plan**

Contention A: The proposed action violates the May 1996 amendment to the Plan which includes allowable use standards to assure recovery of the Mexican spotted owl.

Response: The EA (PR #54) describes the effect on Mexican spotted owl and critical habitat for the 5 allotments for the proposed action Alternative 3. Four of the allotments had a "no effect" determination for both the species and critical habitat while Macho allotment had a "may affect not likely to adversely affect determination" for the critical habitat portion only (pp. 58-60). The EA describes the protected activity centers, owl surveys, and the critical habitat primary constituent elements (PR #54 pp. 46-54). USFWS concurred with these findings (PR#49).

The 1996 amendment to Forest Plans in the Southwestern Region provides guidance in establishing allowable forage use for protection and recovery of federally listed threatened and endangered species as site-specific allotment NEPA is completed. Allowable forage use is generally developed specifically for an allotment and concurred upon with the US Fish and Wildlife Service during informal or formal consultation. The proposed action management requirements implement Forest Plan forage utilization standards and guidelines to maintain owl prey availability and promote development of owl habitat (PR #35).

Finding: The Responsible Official appropriately established levels of forage utilization to assure recovery of the Mexican spotted owl.

Contention B: The EA does not address the Plan features such as where the key forage areas are, or when they will be monitored.

Response: Proper forage utilization standards are employed to sustain such things as plant health and vigor, long-term soil productivity, and protection for threatened, endangered, and sensitive species and their habitats. Forage utilization levels are determined based on guidelines set out in the R-3 Allotment Analysis Guidelines. These guidelines specifically describe appropriate forage utilization levels recommended for the purpose of improving rangeland condition.

Forage utilization is measured by key area on key forage species within various pastures encompassing a grazing allotment. Key areas are locations readily accessible to water and forage and are located on level to intermediate slopes. Key species are herbaceous and woody vegetation that domestic livestock prefer at any given time of the year. By monitoring key areas,

the Forest Service can ensure that an allotment or pastures within an allotment are not overgrazed.

The EA (p.15 PR #54) says that key areas will be monitored for utilization and cattle moved when utilization approaches conservative use standards. There is no NEPA requirement to disclose the names and locations of key areas or when they will be monitored.

Finding: The Responsible Official did not violate NEPA by not disclosing the key area names and locations or when they will be monitored. There is nothing in federal statutes, regulations, or Forest Service policy that requires the Responsible Official to disclose the names and locations of each and every key area within an allotment in an EA. Utilization standards and monitoring protocol for the five Pecos Allotments were developed in accordance with Forest Service policy and the 1996 Forest Plan Amendment.

Contention C: The EA does not address how Forest Plan standards for water quality, soils, and grazing management are going to be met. These standards are not discussed at all.

Response: Soil impacts are discussed in the EA (pp.20-26 PR#54) along with water/riparian impacts (pp.26-36). The project was designed to be in conformance with the Santa Fe LRMP standards for Management Areas A, B, and E (Decision Notices PR #55-59 p.3). A detailed listing of Forest Plan standards and expected compliance is provided in PR #52. The Forestwide and MA guidelines allow grazing under allotment management planning to meet objectives. Specific guidance under D01 and D02 standards and under Level B, C, or D management allows livestock grazing, use of structural improvements, and forage improvement actions at various levels (Santa Fe LRMP PR #1 pp. 66, 67, 100, 109, 211-212).

Finding: Forest Plan standards have been met. Soil, water and grazing follow LRMP Management Area direction. Allotment management planning in this project conforms to Plan direction to analyze and develop management strategies for each allotment.

ISSUE 2: No sensitive species evaluation pursuant to FS Manual 2620 and 2670 has been completed and the project violates the Endangered Species Act in regards to spring development.

Contention A: The impact from the spring developments on sensitive species is overlooked and the spring developments are not addressed in context of how many undeveloped springs exist in area. Two of the spring developments are either inside or very near Mexican spotted owl PACS but it is not clear from EA where they are located. Impacts to owls are not addressed. Depending on which part of the project is read, the number of spring developments changes, the Macho Creek DN says one spring, but the map shows two.

Response: Decision Notices for the 5 allotments show the number of existing and new facilities to be developed, including springs and wells. Bull Creek, Cow Creek and Soldier Creek have no new developments, while Macho has 1 new spring (in the Dalton Pasture) and 1 new well (in the Indian Creek pasture), and Valle Osha has 1 existing spring repair (DNs PR# 55-59 chart p.1). The EA shows the same new water development work in Table 4 with a new total of 7 developments versus the current number of 4 developments (EA PR #54 p. 17). Compaction

around water troughs in small areas is acknowledged on page 23 of the EA, while springs are fenced to keep cattle out (Soils, Water, Riparian and Vegetation Specialist Report, PR#29). The Soils section of PR#29 discusses soils benefits of fencing the springs to exclude livestock.

Development of the spring and well for the Macho allotment were included in the Biological Assessment (PR#35). This information was submitted to the U.S. Fish and Wildlife Service (Service), and the Service concurred with the determination that the proposed action “May Affect, but is Not Likely to Adversely Affect” the Mexican spotted owl (PR#49).

Reconstruction of the existing spring on the Valle Osha allotment (PR#34) was determined to have “No Effect” on the Mexican spotted owl or Mexican spotted owl critical habitat. The EA describes the protected activity centers, owl surveys, and the critical habitat primary constituent elements (PR #54 pp. 46-54). This information is directly from the Biological Assessments (PR#34, 35), and the Wildlife Specialist Report (PR#43, 44).

Effects of the proposed action on sensitive species are described in the EA (PR #54 p.p.74-79) and wildlife reports (PR#43, 44) and the Biological Evaluation (PR#38). From these documents, it is clear that the only sensitive species potentially affected by the spring developments do not occur on the allotments. This determination was supported by field reconnaissance (PR#30). This complies with the direction in FSM 2670 for evaluation of Sensitive species, specifically 2672.43-Exhibit 01. A determination of “No Effect” was made based on the absence of potentially affected sensitive species.

Finding: The sensitive species analysis and review of effects on threatened and endangered species and critical habitat meets requirements of Forest Service direction FSM 2670 and the Endangered Species Act of 1973, as Amended.

ISSUE 3: The project does not meet the requirements of NEPA and violates the Administrative Procedures Act.

Contention A: The document is not specific and is not finished. The EA implements a grazing scheme that has maximum and minimum livestock numbers but articulates no comprehensive scheme for making the decision, and its mitigation plan is ambiguous. A salting plan is yet to be developed although this relied upon to achieve the need to move cattle.

Response: The EA discloses that the minimum and maximum numbers will be determined by range monitoring, such as monitoring for effects of weather and drought to determine early or late turnout dates for cattle (PR #54 p.4). This type of flexibility in range management operations is directed by Forest Service policy in using adaptive management (FSH 2209.13 Chapter 90). By stating the months and numbers the EA analyzed possible effects to resources that could be estimated for an informed decision. The salting plan will be developed to minimize impact to riparian zones, meadows and other resources. Locations of salt blocks will vary annually and will not be within ¼ mile of water resources (PR#54 p.15).

Finding: This EA for a 10-year grazing permit sets numbers and timing limits that were analyzed for site specific effects. The analysis was adequate under NEPA for the informed decisions on the 5 allotments made by the Responsible Official.

Contention B: The Forest Services uses the Clean Water Act 303(d) list as if this is a threshold for water quality impacts, which is irrelevant for purposes of conducting a NEPA analysis into water quality impacts. There is no quantitative analysis of the alternatives and impacts on riparian areas and other resources.

Response: The Soil and Water Report (PR#29) and EA (PR#54 p. 26-32) appropriately use measures of impaired condition from the state 303(d) list and site-specific information from Proper Functioning Condition surveys to describe the existing condition and characterize the affected environment in the context of water and riparian areas. PFC survey copies are found in the record (PR#4, 5, 7-14). Impacts of each alternative on water quality and riparian function are thoroughly evaluated for each allotment and each stream (EA PR#54 p.33-35).

Finding: Analysis of impacts on water and riparian resources was adequate under NEPA for the informed decisions on the 5 allotments made by the Responsible Official.

Contention C: Impacts of increased livestock on the Soldier Creek allotment are barely addressed, although it authorizes a large impact. There is no plan about what to do if things go wrong in Soldier Creek or if funding does not materialize.

Response: Soldier Creek will be used as a swing allotment for the entire District. This will allow cattle from overused pastures to graze on a short-term basis. Temporary grazing permits will be issued to manage the allotment (EA PR#54 p.10). Impacts to Soldier Creek Allotment are described for all resources and all alternatives for comparison and disclosure in the EA (PR #54 pp.20-128). Mitigation and monitoring requirements are described in the EA (PR #54 pp.15-17).

Finding: The analysis of impacts to Soldier Creek is adequate for an informed decision under NEPA. Possible future violations or lack of future funding are speculative concerns that are outside the scope of this decision.

Contention D: The appellant contends that a range of reasonable alternatives, as required by NEPA implementing regulations, was not analyzed. Other alternatives that could have been addressed include an alternative with range developments but left Soldier Creek alone, or one with strict monitoring guidelines for Soldier Creek, or an alternative that grazed fewer cows over a smaller area. These other alternatives would meet the purpose and need.

Response: "[A]n agency must look at every reasonable alternative, within the range dictated by the 'nature and scope of the proposed action' and 'sufficient to permit a reasoned choice.'" *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992). For an alternative to be reasonable, it must meet the stated purpose and need and address one or more issues. The formulation of alternatives is driven by significant issues identified in scoping (40 CFR 1501.2(c)).

No new significant issues were raised by the public during scoping (PR#28 and EA p. 12). There were 3 alternatives discussed and eliminated from detailed study that included variations on use of pastures and use of the Soldier Creek allotment (EA PR#54 p.14 and PR#23). The alternatives evaluated in detail included the current situation, a no grazing alternative, and the proposed action (EA PR#54 pp.14-15).

Finding: The Responsible Official appropriately defined the scope of the analysis and analyzed a range of reasonable alternatives within that scope.



United States
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Forest
Service

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Camino Real Ranger District

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File Code: 1570-1
Route To:

Date: December 8, 2004

Subject: ADO, Appeal #05-03-010-0004-A215, Bull, Cr., Cow Cr., Macho, Soldier Cr.,
and Valle Osha Cattle Allotments, Pecos/Las Vegas Ranger Districts

To:

This is my recommendation on the disposition of the appeal filed regarding the five Decision Notices (DN) and Findings of No Significant Impact (FONSI), one Environmental Analysis (EA), which provides for the following:

- Bull Creek Allotment 48 cattle for up to 5 months
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District Ranger Joseph Reddan published his decisions on September 28, 2004, for the Pecos/Las Vegas Ranger Districts on the Santa Fe National Forest on the allotments. The District Ranger is identified as the Responsible Official, whose decision is subject to administrative review under 36 CFR § 215 appeal regulations.

Informal Disposition

Pursuant to 36 CFR § 215.17, an attempt was made to seek informal resolution of the appeal. The record indicates that informal resolution was not reached.

Review and Findings

My review of this appeal was conducted in accordance with 36 CFR § 215.19. The appeal record, including the appellant's issues and request for relief has been thoroughly reviewed. Having reviewed the Environmental Assessment (EA), DN/FONSI, and the project record file, as required by 36 CFR 215.19(b), I conclude the following:

- 1) The decision clearly describes the actions to be taken in sufficient detail that the reader can easily understand what will occur as a result of the decision.
- 2) The project record shows the environmental analysis was thorough, reasoned, in line with laws, regulations, and national policy, and appropriate for the decisions to be made.
- 3) The scoping and public involvement process was appropriate, responsive to comments and suggestions from interested parties, and effective in developing alternatives and evaluating effects.



After considering the claims made by the appellants and reviewing the record, I found that the Responsible Official conducted a proper and public NEPA process that resulted in decision that are consistent with the Santa Fe National Forest Plan. I found no violations of law, regulations, or Forest Service Policy.

Recommendation

I recommend the Responsible Official's decisions relating to this appeal be affirmed with respect to all of the appellant's contentions.

Sincerely,

/s/ Cecilia R. Seesholtz

CECILIA R. SEESHOLTZ
Appeal Reviewing Officer
District Ranger

cc: Constance J Smith, David Stewart, Berwyn Brown, Joseph Reddan, Allen Fowler, Mailroom R3 Santa Fe, Cecilia Seesholtz